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No. 01-631

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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–INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all fifty states. WLF devotes a substantial portion of its resources to supporting the Nation's campaign against drug trafficking as well as its efforts to improve domestic security. To that end, WLF has appeared as *amicus curiae* before this Court as well as other federal and state courts in cases involving Fourth Amendment issues.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

SUMMARY OF ARGUMENT

This case involves one of the most important and commonly used tools of law enforcement – consensual police questioning of citizens. This Court, as well as many others, has recognized this type of police-citizen encounter to be vital to the safety and security of all citizens. The significance of consensual police-citizen questioning is amplified in the context presented here – public surface transportation such as buses and trains. It has long been the case that such transportation systems have been targeted by criminals. And in the new domestic security environment, we can

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

legitimately expect the criminal focus on public surface transportation to increase.

The question before the Court – the circumstances under which police-citizen questioning in the context of public surface transportation (specifically, aboard a bus) becomes a seizure under the Fourth Amendment – therefore has significant implications. In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court held that the relevant inquiry is whether, under the totality of the circumstances, "a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 436. This holding has been criticized for creating a supposedly unrealistic test, and the lower courts have encountered considerable difficulty in uniformly applying the holding of *Bostick*, even in similar factual scenarios. This is especially true of the question of the weight the courts are to accord the common fact that the officers in a given situation have not informed the citizen whom they are questioning of the right not to cooperate with the questioning. In this case, the lower court effected a *per se* rule that officers conducting questioning of citizens on a bus must give such a warning. In doing so, the court of appeals misconstrued *Bostick*.

When one traces the development of the Court's jurisprudence, it becomes apparent that the core question in determining whether police questioning becomes a seizure, is the voluntariness of the interaction. As defined by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the concept of voluntariness is an accommodation of the importance of the police activity with the possibility of unfair or brutal police tactics. The relevant standard, therefore, is whether the police conduct is so intimidating as to overwhelm the will of a reasonable person and critically impair that person's self-determination. *Id.* at 225.

Focusing on this foundation, it becomes apparent that the Fourth Amendment does not demand a *per se* requirement that officers inform citizens of their right to refuse to answer

questions, even in the confines of a bus. Given this, *amici* urge the Court to reverse the lower court and to reaffirm the vitality of *Bostick*.

ARGUMENT

I. CONSENSUAL QUESTIONING OF CITIZENS BY POLICE IS AN IMPORTANT TOOL FOR LAW ENFORCEMENT

Police questioning of citizens that is not based on any reasonable suspicion of criminal activity is an essential law enforcement tool. This type of consensual police-citizen encounter often leads to important information or evidence of a crime:

> [T]he police interest in *voluntary* questioning is great. To hold that the police cannot even ask voluntary questions of those who strike them as knowledgeable or suspicious would severely interfere with their ability to detect or investigate burglaries, murders, drug traffic and other crimes . . . . to force the police to give up the practice of polite, voluntary questioning would threaten serious harm to the public interest in safety and effective law enforcement . . .

United States v. Berryman, 717 F.2d 651, 661 (1st Cir. 1983) (Breyer, J., dissenting). Moreover, consensual questioning is the most common type of police-citizen encounter. For example, in one case involving the Metropolitan Police Department of the District of Columbia, the evidence showed that 49.5% of all of the police-citizen encounters recorded by the Department were defined as "face-to-face communication with an individual under circumstances in which the individual is free to leave if he wishes." *Gomez v. Turner*, 672 F.2d 134, 137-38 (D.C. Cir. 1982).

It is important, therefore, to carefully distinguish between consensual police-citizen encounters and those encounters

that amount to a seizure of the person under the Fourth Amendment. If the courts define the scope of consensual police-citizen questioning more narrowly than warranted by the dictates of the Fourth Amendment, law enforcement efforts will be hampered without justification. As Justice Stewart recognized:

> [C]haracterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."

United States v. Mendenhall, 446 U.S. 544, 556 (1980) (opinion of Stewart, J.) (quoting *Schneckloth*, 412 U.S. at 225).

A. Consensual Questioning Is An Especially Important Law Enforcement Tool in the Context of Public Transportation

The need for this careful delineation is especially important for police-citizen encounters on public transportation. The Nation's public transportation system is particularly vulnerable to crime. And this vulnerability is intensified in the context of surface transportation systems such as buses and trains. These modes of transportation are immense and are used by millions of citizens.[2] Moreover, statistics show

[2] The U.S. Department of Transportation reports that U.S. public transportation agencies carry approximately 8 billion passengers per year. *See* U.S. Department of Transportation, Federal Transit Administration, *Surface Transportation Security: Vulnerabilities and Developing Solutions*, *available at* <http://www.fta.dot.gov/research/safe/pubs/sursec/sursec.html> ("*FTA Report*"). One of the largest bus lines reported 25.4 million passenger boardings in 2000. *See* Greyhound Facts & Figures, *available at* <http://www.greyhound.com/company/intermodal/factsandfigures.shtml>. Amtrak reported its train ridership in 2000 to be 84.1 million. National Association of Railroad Passengers, *Basic Amtrak Statistics*, *available at* <http://www.narprail.org/amstat.htm>

that the majority of public transportation violent crimes and drug violations occur on the types of public surface transportation that will be impacted by the Court's decision in this case – motor buses and heavy rail trains.[3] The evidence also shows that smugglers target commercial carriers, apparently because "the odds of successful interdiction are minuscule." Steven E. Flynn, *Transportation Security: Agenda for the 21st Century*, TR NEWS 3, 4 (No. 211, Nov.-Dec. 2000) (noting conservative estimates of 129 to 172 metric tons of cocaine arrived in the United States via commercial carrier in 1997). Largely because of these problems, the U.S. Department of Transportation is currently proposing a budget of $1.9 billion for national security programs in 2002. U.S. Department of Transportation, 2002 BUDGET IN BRIEF at 9.

Given these realities, the need for consensual police-citizen questioning in public transportation situations cannot be

[3] Bureau of Transportation Statistics, U.S. Department of Transportation, *National Transportation Statistics, Reports of Violent Crime, Property Crime, and Arrests by Transit Mode* at Table 2-34 (2001). Official statistics are only kept for urbanized areas with populations over 200,000. *Id.* The records show that in the years 1995-98, the following crime occurred in this limited subset of public transportation: 109 homicides, 145 forcible rapes, 15,818 robberies, 11,204 aggravated assaults, 11,563 other assaults, 3,476 sex offenses, and 14,699 drug violations.

questioned.[4] While many have questioned the desirability of consensual police-citizen questioning on public surface transportation as a tool for the Nation's war on drugs (reflecting more of a cynicism toward the war on drugs in general than the efficacy of such questioning), the value of this law enforcement tool in the current domestic security environment is indisputable. Experts have years ago recognized that "[c]ontemporary terrorists have made public transportation a new theater of operations." Brian Michael Jenkins, *Protecting Surface Transportation Systems and Patrons from Terrorist Activities: Case Studies of Best Security Practices and a Chronology of Attacks*, Norman Y. Mineta International Institute for Surface Transportation Policy Studies, Report 97-4 at 1 (1997). The threat of terrorism is especially prevalent for surface transportation:

> Open to relatively easy penetration, trains, buses, and light rail systems offer an array of vulnerable targets to terrorists who seek publicity, political disruption, or high body counts. High concentrations of people in relatively crowded quarters are inviting fodder for those who would cause mayhem and death.

Brian Michael Jenkins & Larry N. Gerston, *Protecting Public Surface Transportation Against Terrorism and Serious Crime: Continuing Research on Best Security Practices*,

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[4] *See, e.g., United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990) ("[Interdiction] programs seek to assure the safety of passengers and to prevent public transport from becoming a haven for narcotics trafficking. They depend for their success upon voluntary interviews with passengers, searches of abandoned or unclaimed luggage, and/or searches pursuant to voluntary consent."); *United States v. Seventy-Three Thousand, Two Hundred Seventy-Seven Dollars, United States Currency*, 710 F.2d 283, 289 (7th Cir. 1983) ("voluntary police-citizen encounters are necessary, particularly at major metropolitan airports, in order that law enforcement officers might attempt to protect the security of our nation").

Mineta Transportation Institute Report 01-07 at 1-2 (2001) ("MTI REPORT 01-07").[5] "That surface transportation terrorism has become an international phenomenon is beyond dispute. The nearly 800 accounts described in two volumes of examination testify to the extent that the practice of this abhorrent activity extends almost everywhere." MTI REPORT 01-07 at 101.

Experts in transportation security have verified that police presence aboard public transportation, which will inevitably lead to police-citizen encounters, results in reduced violent crime. *See* Jerome A. Needle & Renee M. Cobb, *Improving Transit Security*, Synthesis 21, Transit Cooperative Research Program, Transportation Research Board, National Research Council at 8-9 (1997); *FTA Report*, *supra*, at § 3.3 (noting uniformed and non-uniformed officer strategies to reduce crime on surface transportation). More to the point, the experience of transportation security agencies is that consensual police-citizen questioning is a valuable deterrent to would-be assailants. *See, e.g.*, MTI REPORT 01-07 at 45 (recounting experience of the Bay Area Rapid Transit District, which is the largest automated rail service in California). As the threat of terrorism against surface transportation grows, the importance of consensual police-citizen questioning in public transportation contexts increases.

II. THE COURT WILL UNDOUBTEDLY BE ASKED TO REDEFINE THE SCOPE OF CONSENSUAL POLICE QUESTIONING

Despite the importance of consensual police-citizen questioning, the Court's jurisprudence concerning when a

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[5] *See also FTA Report, supra,* at § 1 ("A surface transportation system is vital to any Nation's economy, defense and quality of life. Because transportation systems bring masses of people together and are highly visible and familiar, they are particularly attractive targets for both terrorism and crime").

police-citizen encounter becomes a seizure under the Fourth Amendment has been the source of unending scholarly criticism and the source of disparate judicial interpretations. Given this, the Court will surely be asked to use this case as an opportunity to revisit *Bostick* and the scope of consensual police-citizen questioning, specifically with regard to the issue of whether police should be required to inform citizens of the right to decline to answer questions. The Court should rebuff this effort, however, because the Court's jurisprudence is solidly grounded on the concept of "voluntariness," which by definition takes into account the importance of the police activity and precludes any such *per se* requirement.

A. The Court's Development of the "Free to Leave" and "Free to Decline" Tests

It is beyond dispute that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). Rather, it is "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16 (majority opinion). In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart first formulated what would become this Court's test to discern when a police-citizen encounter becomes a seizure under the Fourth Amendment: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

The Court has since embraced this "free to leave" test, which is an objective standard based on the "totality of the circumstances." *See Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality). By looking to whether the reasonable person would have

believed that he was "free to leave," the test "is designed to assess the coercive effect of police conduct." *Chesternut*, 486 U.S. at 573.

In *Bostick*, a case also involving a police-citizen questioning aboard a bus, the Court recognized that in some situations, a citizen will not "feel free to leave" because the citizen's "freedom of movement was restricted by a factor independent of police conduct." 501 U.S. at 436. Thus, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* In such a situation, the Court held that "the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 435-36. The Court also made it clear that "the 'reasonable person' test presupposes an innocent person." *Id.* at 438.

B. Critics Assert That the Tests Suffer From Conceptual Difficulties That Make Them Untenable

Critics of this Court's jurisprudence on consensual police-citizen encounters claim that the "free to leave" test is fatally flawed. According to many courts and commentators, "in virtually every police-citizen encounter the average citizen does not feel free to walk away. Thus, if the ["free to leave"] test was applied consistent with reality, all police-citizen encounters would be seizures." Edwin J. Butterfoss, *Criminal Law: Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 463 (1988); *see also United States v. Cordell*, 723 F.2d 1283, 1286 (7th Cir. 1983) (Swygert, J., concurring).[6]

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[6] *See also* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 522 (2001) (arguing that the Court's "picture

Critics have also charged that in reformulating the "free to leave" test in *Bostick*, the Court exacerbated this conceptual difficulty. As noted by the dissent in *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994), "commentators almost unanimously have condemned the *Bostick* opinion." *Id.* at 1509 & n.4 (*en banc*) (Logan, J., dissenting) (citing leading treatise and law review articles).[7] The common element of these criticisms is that an average person will not "feel free" to decline to answer questions during any police-citizen encounter in the confines of a bus. Based on this supposition, these critics often suggest that any police-citizen encounter on a bus or similar form of transportation should be considered a seizure *per se*.[8]

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of a reasonable person is simply out of touch with societal reality" since "most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police"); *see also* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 n.205 (1990).

[7] *See also* Shawn V. Lewis, Comment, *The Intrusiveness of Dragnet Styled Drug Sweeps*, 82 J. CRIM. L. & CRIMINOLOGY 797, 818 (1992) (criticizing *Bostick* for assuming "artificial reasonable person who would assert himself in most police encounters, even though the average citizen would not"); Todd M. Haemmerle, Comment, Florida v. Bostick: *The War on Drugs and Evolving Fourth Amendment Standards*, 24 U. TOL. L. REV. 253, 265 (1992) ("reasonable person" more "courageous" than average); *The Supreme Court, 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 305 (1991) (arguing that an individual in a restricted environment is less likely to exercise his right not to be interrogated).

[8] *See, e.g.*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(c) (3d ed. 1996) (arguing for *per se* seizure because "the police dominance of the situation" and "bus travelers . . . do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize").

C. The Asserted Conceptual Difficulties Have Infected The Courts

The lower courts have not been immune from the force of the critics' claimed conceptual difficulties. While the lower courts are of course obliged to follow *Bostick*, the impact of the supposed problems with the *Bostick* test manifests itself in disputes over what factors the courts may consider and what weight to give these factors.[9]

While the criticisms and differences are understandable if one focuses myopically on the words of the "free to leave" and *Bostick* tests, this concentration misapprehends the basis for these tests. As demonstrated below, the line that separates permissible police-citizen questioning from a seizure is voluntariness. And using the concept of "voluntariness" as a base resolves the supposed difficulties with the *Bostick* test.

III. THE COURT SHOULD REAFFIRM *BOSTICK* AS SOLIDLY SUPPORTED BY THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE

Given the increasing importance of consensual police-citizen questioning in public transportation situations as well as the apparent confusion in the lower courts, the Court should clarify the relevant standard by returning to the

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[9] *Compare United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) (duty to obey police a factor) *with Gomez v. Turner*, 672 F.2d 134, 142 (D.C. Cir. 1982) (feelings of civic duty not a factor); *compare United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992) (nonpublic location substantial factor) *with United States v. Little*, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (*en banc*) (nonpublic location irrelevant); *compare Little*, 18 F.3d at 1506 (incriminating questions not a factor) with *United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (seizure occurred when officer told defendant that he was stopped because he fit drug courier profile).

touchstone of the consensual police-citizen encounter – voluntariness.

A. The Touchstone For the Line Between Permissible Questioning and A Fourth Amendment Seizure Has Always Been Voluntariness

By tracing the development of this Court's jurisprudence on police-citizen encounters, it becomes apparent that the normative underpinning of what separates a situation where the Fourth Amendment is not implicated from those constituting a seizure has been voluntariness. While the genesis of the Court's "free to leave" test has been attributed to Justice Stewart's opinion in *Mendenhall*, which drew on dicta and the concurring opinion in *Terry*, the roots run deeper. *Mendenhall* itself relied on *Sibron v. New York*, 392 U.S. 40 (1968), which, while not deciding whether a seizure had taken place at the particular point in the officer-citizen encounter, framed the issue as "whether [the defendant] accompanied Patrolman Martin outside in a submission to a show of force or authority which left him no choice, or whether he went *voluntarily* in a spirit of apparent *cooperation*." *Id.* at 63 (emphasis added).

Justice Stewart's opinion in *Mendenhall* stated the applicable test as: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554. While this "free to leave" test was developed from the *Terry* dicta that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred," *Terry*, 392 U.S. at 19 n.16, the core of the test is voluntariness. As later recognized, the opinion of Justice Stewart was based on "the view that the entire encounter was *consensual* and that no seizure had taken

place." *Royer*, 460 U.S. at 491 (plurality opinion) (emphasis added).

As the plurality in *Royer* explained, a seizure does not occur so long as the citizen's cooperation is voluntary:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

460 U.S. at 497. In that case, the law enforcement officers' conduct resulted in a seizure of the defendant because the defendant's cooperation became involuntary: "What had begun as a *consensual* inquiry in a public place had escalated into an investigatory procedure in a police interrogation room . . . . any *consensual* aspects of the encounter had evaporated." *Id.* at 503 (emphasis added). In adopting the "free to leave" test from Justice Stewart's opinion in *Mendenhall*, the plurality recognized the task as "distinguishing a *consensual* encounter from a seizure." *Id.* at 506.

Thus, while framed in terms of whether a reasonable person would have believed that he was free to leave, what distinguishes a police-citizen encounter as a seizure or not a seizure is the voluntariness of the interaction.[10] This is demonstrated by the Court's explanation that the "free to

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[10] *See also Delgado*, 466 U.S. at 229 (Brennan, J., dissenting) ("Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a 'show of authority' of sufficient size and force to *overbear the will of any reasonable person*." (emphasis added)).

leave" test "is designed to assess the coercive effect of police conduct." *Chesternut*, 486 U.S. at 573. The logic is that if a reasonable person would not feel free to leave, the interaction is not consensual because the officer's conduct has coerced compliance.

B. By Definition, The Concept of Voluntariness Accommodates the Importance of Police-Citizen Questioning

For many police-citizen interactions, the "free to leave" test works as a measure of the voluntariness of the encounter because a restriction on a person's physical freedom of movement by "physical force or a show of authority" is the essence of a seizure. *T ~ry*, 392 U.S. at 19 n.16; *see also California v. Hodari D*, 499 U.S. 621, 625 (1991). Where a person's freedom of movement is already restricted for reasons other than the police presence, as in *Bostick*, the analogy to a physical seizure breaks down. Thus, the *Bostick* inquiry of "whether a reasonable person would feel free to decline the officer's requests" is further attenuated from the core question of voluntariness.

But by framing the issue as whether a reasonable person would "feel" free to decline to answer the officer's questions, the language that the Court used subtly changed the emphasis of the voluntariness test. Since the "feel free" test brings with it an emotional aspect, the critics rightly ask, "Who would *feel* free to ignore an officer's show of authority?" It can be questioned, therefore, whether the "feel free to decline" test is the appropriate measure of the coerciveness of the interaction. The concept of voluntariness, however, does not turn on epistemology.

> Rather, "voluntariness" has reflected an accommodation of the complex values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Schneckloth, 412 U.S. at 224-25; *see also id.* at 227 ("two competing concerns must be accommodated in determining the meaning of 'voluntary' consent – the legitimate need for such searches and the equally important requirement of assuring the absence of coercion").

Although developed in the parallel branch of Fourth Amendment jurisprudence dealing with consensual searches, the *Schneckloth* definition of voluntariness is no doubt applicable to consensual police-citizen questioning. As the Court explained in *Hodari D*, a seizure requires submission. 499 U.S. at 628-29. "Since voluntary consent and submission are essentially opposing sides of the same coin, the standard for measuring consent should be equally satisfactory to determine whether, instead of consenting, the person surrenders to the authority by recognizing that he or she is subject to the will of the police." Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis after* Hodari D *and* Bostick, 28 AMER. CRIM. L. REV. 799, 821-22 (1991).

This is not to say that the Court should require an inquiry into the citizen's subjective state of mind; the Fourth Amendment standard for what constitutes a seizure is necessarily objective. *See Chesternut*, 486 U.S. at 574; *see also Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding that the scope of a consent search must be determined by an objective standard). "Voluntariness" for purposes of seizure analysis, therefore, must be seen through the objectifying lens of a reasonable person and the need for police to determine when questioning becomes a seizure. *See id.*

Given the importance of police-citizen questioning (especially in the context of public transportation), the

Schneckloth concept of "voluntariness" clarifies the line between consensual police-citizen questioning and a seizure. Only if the citizen's cooperation with the police is *involuntary* does the interaction become a seizure. The relevant question, therefore, is perhaps not best framed as "whether a reasonable person would *feel* free to decline the officer's requests," but whether (under the totality of the circumstances) the police conduct was so intimidating that a reasonable person's "will has been overborne and his capacity for self-determination critically impaired." 412 U.S. at 225.

The critics' assertion that no reasonable person would feel free to decline to answer an officer's questions therefore misses the mark. By definition, the concept of voluntariness accommodates the recognized importance of police questioning of citizens aboard surface transportation that is not supported by reasonable suspicion. This, of course, necessarily precludes any *per se* rule that such questioning constitutes a seizure.

That *Bostick* ultimately rests on the concept of voluntariness demonstrates that the decision was sound. Nonetheless, the Court's formulation of the relevant test (focusing on whether the reasonable person would have *felt* free to decline to answer the officer's questions) may have resulted in the lower courts unnecessarily restricting the scope of consensual police-citizen questioning.

C. By Focusing on Whether the Police Conduct Would Overbear a Reasonable Person's Will and Critically Impair That Person's Capacity For Self-Determination, the Court Would Clear Up the Confusion in the Lower Courts

By explicating the roots of the *Bostick* test, the Court would do much to stem the disparate results in the lower courts, which are based on differing treatment of certain factors. For example:

Civic duty to obey the police: In *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), the Eleventh Circuit stated that, given the factual situation, "[a]bsent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooperate with the police." *Id.* at 1357. Other courts, however, have explicitly recognized that "feelings of civic duty, moral obligation, or simply proper etiquette, will often lead a reasonable person to cooperate." *Gomez*, 672 F.2d at 141-42. Accordingly, "[t]here must be some additional conduct by the officer to overcome the presumption that a reasonable person is willing to cooperate with a law enforcement officer." *Id.* at 142.

If the relevant question focuses not on whether a reasonable person would "feel" free to decline to answer, but rather whether that person's will was overborne, it becomes clear that feelings of duty and respect for police should not be considered in the totality of the circumstances. Feelings of civic duty do not add to the measure of the coerciveness of the questioning.

The location of the encounter: In *United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992), the court found the fact that the defendant was questioned in a "nonpublic" small roomette aboard a passenger train weighed substantially in favor of finding an unlawful seizure. *Id.* at 1529-31. Addressing a case where the police-citizen questioning also occurred in a train roomette, the Tenth Circuit *en banc* observed in contrast:

> [I]t is simply an assumption, unsupported by any specific data or evidence, that a person in a private train roomette, not in the view of other passengers, will feel more vulnerable to coercion than a person who is in the view of other people. It may be that many people would in fact feel more "coerced" in a public setting, where they might be embarrassed to decline police requests in the hearing and view of others.

United States v. Little, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (*en banc*) (*Little I*). In the very same case, in an appeal after remand, however, a panel of the Tenth Circuit viewed the "confined space" and the fact that the questioning was "outside public view" as a factor in holding that the defendant was seized. *United States v. Little*, 60 F.3d 708, 713 (10th Cir. 1995) (*Little II*). And another panel of the Tenth Circuit also considered questioning in a "nonpublic place" to be a factor. *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996); *see also Ward*, 961 F.2d at 1532 n.5 (rejecting holdings of several District of Columbia Circuit opinions on this issue).

Again, if the relevant question is whether the police conduct was so intimidating as to critically impair a reasonable person's capacity for self-determination, the public or nonpublic location of the encounter should be irrelevant. Whether a person would feel embarrassed to refuse to answer questions posed by an officer in front of others or would feel somehow "safer" in public does not add to the analysis.

Incriminating questions: In *Ward*, the Tenth Circuit reasoned that an officer asking "not just general inquiries, but . . . focused, potentially incriminating questions" is a factor tending to show a seizure because a person would not feel free to ignore the police questioning. 961 F.2d at 1532. In *Little I*, however, the Tenth Circuit stated that "the asking of 'incriminating questions' is irrelevant to the totality of the circumstances surrounding the encounter." 18 F.3d at 1506. Many other courts, however, place great weight on focused and incriminating questions. *See, e.g., United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (seizure occurred when officer told defendant that he was stopped because he fit drug courier profile); *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) (*en banc*) (reasoning that questions intimating that investigation was focused on an individual would lead a reasonable person to believe that he was not free to go).

Whether the officer's questions were focused on defendant may well bear on whether a reasonable person would have *felt* free to decline to answer, but the nature of the questions would have little impact on whether the conduct overbore a reasonable person's will. Turning to the core issue of voluntariness, therefore, helps to resolve the conflict

Personal traits of the defendant: In *Ward*, the Tenth Circuit observed that the fact that the defendant was of "slight physique" and had "recently undergone a kidney transplant for which he was still taking medication" suggested that he "was more easily intimidated." 961 F.2d at 1533. In *Little I*, however, the Tenth Circuit rejected the relevance of the defendant's subjective state of mind and held that only personal traits or characteristics known to the questioning officer are relevant. 18 F.3d at 1505.

Although a factor in consent search cases, the concept of voluntariness in consensual police-citizen questioning must be based on objective standards. As the court held in *Little I*, the personal traits of the defendant are only relevant if they were known to the questioning officer.

The failure to inform of the right not to respond: In the case before the Court, the Eleventh Circuit's opinion leaves little doubt that it placed heavy emphasis on the fact that the officers did not inform the bus passengers of the right not to cooperated with the officer's questioning, as it had in *Washington*, 151 F.3d at 1355. The Ninth Circuit has also given this factor dispositive weight. *See United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). The Tenth Circuit, on the other hand, has at one time held that this is a substantial factor in holding that a police-citizen encounter is a seizure, *see Ward*, 961 F.2d at 1529, and at another criticized the Eleventh Circuit for placing too much weight on it, *see United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000).

While a factor, the failure of the police to inform of the right not to respond cannot be dispositive; "knowledge of a right to refuse is not a prerequisite of a voluntary consent." *Schneckloth*, 412 U.S. at 234.

Similarly, by focusing on voluntariness, the Ninth Circuit would not have concluded in *Stephens* that the officer's announcement in that case resulted in a seizure. In that case, three officers boarded a bus stopped for servicing and announced over the public address system that they were "conducting a routine narcotics and weapons investigation on this bus. No one is under arrest, and you are free to leave. However, we would like to talk to you." 206 F.3d at 916. The Ninth Circuit reasoned that this conveyed the message that they could "stay on the bus and consent to the search, or get off the bus" and (supposedly) run the risk of raising a reasonable suspicion. *Id.* at 917. This supposed message, combined with the cramped quarters of the bus, the presence of three plain clothes officers, and the fact that the defendant was questioned first, resulted in a seizure of the defendant when an officer asked him if he owned a certain bag. *Id.* at 917-18.

As the dissent noted, however, the defendant had three choices: truthfully respond to the officer's questions, deny he had any baggage, or ignore the question and say nothing. *Id.* at 919 (Sneed, J., dissenting). Had the question been whether the defendant's denial of ownership was the result of intimidation so great as to critically impair a reasonable person's capacity for self-determination, the majority may well have agreed with the dissent. But focusing on whether a reasonable person would *feel* able to decline to answer led to a split in the panel.

If uncorrected, it is not hard to see how the current lower court case law will lead to flawed results. Imagine a uniformed officer riding aboard a fairly crowded passenger train who notices a person place a bag in an empty seat then move down the train car and stand next to the exit doors of

the train. Worried that the bag may contain dangerous materials, the officer asks in a loud voice whether anyone claims the bag. Getting no response, the officer announces that unless anyone claims the bag, he will examine it for safety reasons. The owner of the bag, which in fact contains explosives, stays silent. The officer examines the bag, realizes what it contains, stops the train, orders the passengers off, and arrests the owner. Under the reasoning of the Eleventh Circuit here and the Ninth Circuit's holding in *Stephens*, the officer's actions would likely be held to be a seizure, and the abandoned bomb-containing bag must be suppressed. *See also Illinois v. Besser*, 652 N.E.2d 454, 457-58 (Ill. App. 1995) (holding that police asking whether bus passenger owned a bag amounted to a seizure rendering abandoned bag illegally searched). It is difficult to square such a result with the notion that voluntariness necessarily incorporates the importance of consensual police-citizen questioning. *Cf. United States v. Garcia*, 909 F. Supp. 334, 338 (D. Md. 1995) (holding that police asking passengers to identify bags they owned was not a seizure despite police not informing the passengers of the right not to cooperate).

IV. THE COURT SHOULD AVOID IMPOSING ANY *PER SE* REQUIREMENT THAT LAW ENFORCEMENT OFFICERS GIVE A WARNING TO PUBLIC TRANSPORTATION PASSENGERS

There can be little doubt that the court below effectively announced a *per se* rule that officers approaching a passenger on board public transportation must inform the passenger of the right to refuse cooperation. The court explicitly followed the logic of its prior decision in *Washington*, *see* Pet. App. 5a, where the dissent recognized that "[s]hort of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions these officers could have taken to make this search any more reasonable." 151 F.3d at 1358; *see also Broomfield*, 201 F.3d at 1275 (criticizing *Washington*). Tellingly, the *Washington* majority stated, "It

seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so." 151 F.3d at 1357.

A. Warnings Are Not Needed *Per Se* to Ensure That A Passenger's Cooperation Is Voluntary

There are, of course, situations where the Constitution requires that police inform citizens of their right not to answer questions. *See Dickerson v. United States*, 530 U.S. 428, 437-38 (2000). Thus, the Fifth Amendment requires that police give the now-familiar *Miranda* warning before questioning a suspect in custody because the coercion inherent in custodial interrogation renders a totality of the circumstances test insufficient to protect against coerced confessions. *Id.* at 442. Police questioning of citizens, even in the confines of a bus, is a horse of a different color.

Like confessions, the question of whether a police-citizen encounter is a seizure also turns on the voluntariness of the encounter. Assuming that Fourth Amendment protections are coextensive with those of the Fifth Amendment (and there is reason to doubt this),[11] an initial question is whether questioning in the confines of public transportation, a bus in particular, exerts the same coercive effect as custodial interrogation. In rejecting the suggestion that the Fourth Amendment requires officers to inform citizens of the right to refuse in the context of an officer's seeking consent for a search, the Court in *Schneckloth* reasoned that the practicalities and the environment of such interactions do not merit a *per se* rule requiring such a warning:

> it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an

[11] *See Dickerson*, 530 U.S. at 441 ("unreasonable searches under the Fourth Amendment are different from unwarned interrogation").

> effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. . . . these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona*, *supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

412 U.S. at 231-32. Similarly, the Court rejected the suggestion that an officer must inform a lawfully seized citizen that he is "free to go" before the citizen's consent may be recognized as voluntary. *Ohio v. Robinnette*, 519 U.S. 33, 39-40 (1996).

The logic of these cases dictates that no *per se* rule would apply in the situation now before the Court. The *Washington* court distinguished *Schneckloth* and *Robinette* because those cases involved consensual searches after the defendant had been lawfully detained. 151 F.3d at 1357. But given that consensual police-citizen questioning rests on the same foundation – voluntariness – this distinction is irrelevant. Moreover, police questioning in the confines of a bus is a far cry from the carefully structured environment of custodial interrogation. *See Miranda v. Arizona*, 348 U.S. 436, 450-58 (1966) (describing custodial interrogation techniques). In fact, police have every incentive to avoid creating a coercive environment given the Court's totality of the circumstances test.

B. Any Per Se Warning Requirement Would Result in Substantial Costs to Society

The Nation's experience with *Miranda* shows that any *per se* warning requirement would exact societal costs in the form or higher crime rates and more unsolved crime. *See, e.g.*, Paul Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 391 (1996) (stating that

Miranda resulted in "'lost cases' against roughly 28,000 serious violent offenders and 79,000 property offenders"); Paul Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U.L. REV. 1084, 1085 (1996). While such costs might be acceptable to avoid the possibility of the courts being tainted by coerced (and therefore unreliable) confessions, it is difficult to square these potential costs to avoid possibly non-consensual questioning of bus passengers. *Cf. Schneckloth*, 412 U.S. at 242 ("The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial").

That a *per se* rule requiring a *Miranda*-type warning would result in societal costs is buttressed by the unstructured nature of consensual police-citizen questioning. Although many of these cases arise in the quasi-structured scenario of a planned bus or train interdiction, consensual police-citizen questioning more often arises in far less predictable situations. A requirement of a *Miranda*-type warning would undoubtedly inhibit police investigations and result in an increase in unsolved crime.

CONCLUSION

For the foregoing reasons *amici curiae* Washington Legal Foundation and the Allied Educational Foundation respectfully request that the judgment of the court of appeals be reversed.

Respectfully submitted,

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